United Nations A/CN.4/566

General Assembly

Distr.: General
7 March 2006

Original: English

International Law Commission
Fifty-eighth session
Geneva, 1 May to 9 June and 3 July to 11 August 2006

International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

Third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities

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* The Special Rapporteur wishes to express his thanks to the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, Germany for hosting him for the purpose of preparing the third report. He is also grateful to Professor Dinah Shelton of the George Washington University Law School, Washington, D.C., for getting her students to write memorandums on laws and practice of various countries focusing on matters under consideration. The Special Rapporteur also wishes to acknowledge with thanks the research support provided by Ilias Plakokefalos of Athens University Law School, Greece, during the preparation of the present report.

06-26201 (E) 270306

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I. Introduction

1. At its fifty-sixth session, in 2004, the International Law Commission adopted, on first reading, the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[1] In paragraph 3 of resolution 59/41 and of resolution 60/22, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft principles. On the whole, the draft principles were well received by delegations participating in the debate on the report of the Commission in the Sixth Committee during the fifty-ninth session of the General Assembly. Delight was expressed that the Commission was able to produce the draft principles expeditiously, within one year of the Assembly noting the importance of the Commission completing the remaining portion of its mandate under the agenda item "International liability for injurious consequences arising out of acts not prohibited by international law".[2] It will be recalled that at its fifty-sixth session, in 2001, the General Assembly, while expressing its appreciation for the valuable work done on the issue of prevention,[3] requested the Commission to resume its work on the liability aspects, bearing in mind the interrelationship between prevention and liability and taking into account the developments in international law and comments by Governments.[4] In addition to the comments in the Sixth Committee, some Governments also offered written comments on the draft principles of allocation that the Commission finalized in its first reading in 2004.[5]

2. In the present report, the Special Rapporteur analyses the issues that ought to be addressed by the Commission on second reading of the draft principles in the light of comments and observations by Governments. In some instances, specific drafting suggestions were offered by Governments. Such suggestions are not part of the present report. The Commission, within the context of its Drafting Committee, will no doubt consider them at the appropriate time.

II. Comments and observations of Governments on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

A. Significant trends

3. The following trends appear discernible from an analysis of the comments and observations of Governments in their written responses and in statements in the Sixth Committee on the draft principles:

(a) Generally, States welcome the basic approach of the Commission that the draft should be general and residual, leaving flexibility to States to fashion specific

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[1] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 175.

[2] See the statement of the Netherlands in A/C.6/59/SR.17.

[3] For the text of the draft articles on prevention of transboundary harm from hazardous activities, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

[4] Resolution 56/82.

[5] A/CN.4/562.

liability regimes for particular sectors of activity, taking into consideration relevant peculiar circumstances;[6]

(b) There exists a wide acknowledgement of the approach of attaching primary liability to the operator of the activity, that is, the person who is in command or control in the management of the risk at the time the incident giving rise to transboundary damage takes place;[7]

(c) Given the nature of activities contemplated for inclusion within the scope of the draft, namely, hazardous activities, there is support for strict liability of the operator. It is understood that such liability is also limited. Further, there would be exceptions to the liability of the operator. However, such exceptions must be few.[8] Within such a scheme, suggestions were made for the inclusion of a rebuttable presumption of causal connection between the hazardous activity and the transboundary damage. Thus the burden of proof will be on the operator to prove that he is not liable;[9]

(d) Considering that the preferred operator's liability is strict but limited, there was also support for the possibility for supplementary funding from different sources to allocate loss and to minimize as far as possible the burden on the victims of transboundary damage to bear the loss, due to such limited liability. In this regard, it was envisaged that the State of origin would participate in any such supplementary funding scheme.[10] Recalling the duties of the State of origin to ensure that any hazardous activity within its territory or areas under its exclusive jurisdiction and control is conducted with its prior authorization, and that such prior authorization should be conditioned upon the operator employing best means and efforts possible to manage the risk of transboundary harm, it is asserted that the operator should further be required to have the necessary financial means to meet claims of compensation in case of transboundary damage. It is suggested that this could be secured by the operator acquiring suitable insurance or through appropriate bank and other financial guarantees.[11]

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[6] See A/CN.4/549/Add.1, para. 5. Germany, however, doubted the value of the flexible approach as the regime suggested by the Commission, in its view, would not be self-executing. See A/C.6/59/SR.18.

[7] A/CN.4/549/Add.1, para. 63. See also written comments of Pakistan in A/CN.4/562, sect. A, and Uzbekistan, ibid. The United Kingdom of Great Britain and Northern Ireland in written comments submitted to the Secretary-General (hereinafter referred to as "comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006") while strongly supporting the operator's liability and the "polluter pays" principle, opposed imposition of liability, even secondary or residual liability, on the State.

[8] See the comments of Austria in A/C.6/59/SR.18. The United Kingdom of Great Britain and Northern Ireland, however, suggested that the strict liability regime be proposed in less rigid terms and it felt that it may not be applicable across the board to all hazardous activities (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

[9] See also written comments of Mexico, in A/CN.4/562, sect. C.

[10] A/CN.4/549/Add.1, paras. 66, 68, 90 and 91. See also comments of Portugal, the Russian Federation, Sierra Leone and Mexico (A/C.6/59/SR.19 and 25). The United Kingdom of Great Britain and Northern Ireland noted, however, that imposing any residual liability on the State would be problematic (see A/C.6/59/SR.18). Kenya thought that the role of the State should be more limited and the commentary should make it clear that the State of origin is not required to set aside funds (see A/C.6/59/SR.21).

[11] Statement of Germany in A/C.6/59/SR.18. The United Kingdom of Great Britain and Northern Ireland noted that securing insurance and other financial guarantees is not an easy matter and that this requirement should not be imposed in a rigid manner (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

(e) The importance of access to remedies was also highlighted; the State of origin and the other States concerned should allow victims of transboundary damage access to judicial and other administrative forums to pursue their claims of compensation without any discrimination and seek such remedies as are available to national victims of the same damage.[12] There is some support for the establishment of some minimum standards by way of remedies to be made available and of compensation to all victims of damage arising from the hazardous activity, and requiring States to provide the same within their national legislation.[13] In other words, it is regarded as no longer acceptable under international law for a State to authorize a hazardous activity within its territory with a risk of causing transboundary harm and not have legislation in place which guarantees suitable remedies and compensation in case of an incident causing transboundary damage. This obligation of the State, however, is treated, according to one view, as a best effort obligation, without prejudice to the particular circumstances of the country or countries concerned;[14]

(f) The broad definition of damage to include damage to persons, property and environment per se within the national jurisdiction also elicited favourable comments.[15] Suggestions were also made to include damage to global commons beyond national jurisdiction, perhaps to the extent that damage to such areas is directly traceable to the hazardous activity in question.[16] However, regarding the question of standing to sue in case of damage to environment per se, the type of claims that would be admissible including claims concerning the "no-use value" are, in the opinion of some governments, unresolved matters and perhaps best left for a separate examination or regulated by national legislation;[17]

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[12] The United Kingdom of Great Britain and Northern Ireland felt that the matter of access to national administrative and judicial remedies in respect of claims concerning transboundary damage is governed by private international law and should be subject to such principles (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

[13] Statement of the Netherlands in A/C.6/59/SR.17. See also written comments of the Netherlands in A/CN.4/562, sect. E.

[14] See the statement of India in A/C.6/59/SR.18. See also A/CN.4/549/Add.1, sect. E.

[15] The inclusion of environment per se in the definition of damage in principle 2 was objected to by a few delegations on the ground that environmental loss referred to principle 2(a)(iii) could not be easily quantified in monetary terms, and that there would be difficulties in establishing *locus standi* as well as in establishing a causal connection between the activity in question and the environmental damage (see A/CN.4/549/Add.1, para. 77). But these are not unresolvable problems. See section 2 (d) below and also commentary to principle 2, para. (12), commentaries to the draft principles adopted on first reading in 2004, *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10* (A/59/10) (hereinafter cited as commentaries).

[16] See the statements of Italy and New Zealand in A/C.6/59/SR.17. See also written comments of the Netherlands in A/CN.4/562, sect. D.

[17] See A/CN.4/549/Add.1, para. 6. See statements of China, the Russian Federation and India in A/C.6/59/SR.17-19. The United Kingdom of Great Britain and Northern Ireland felt that given the complexities involved in the question of standing and the quantification of damage to environment per se, they should be better explained in the commentary. They were also of the view that State claims concerning such damage should be left outside the scope of the draft principles, and these should be confined only to claims of private parties (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

(g) There was also support for the principles 5 (response measures), 7 (development of specific international regimes) and 8 (implementation).[18]

4. To conclude, it seems to the Special Rapporteur that there was general endorsement of the policy considerations on the basis of which the Commission had already adopted the draft principles on first reading. Some disagreements or differences of view, however, still exist on the form in which these principles could be cast. One group of States viewed it as imperative that these principles be expressed in the form of draft articles and in as prescriptive a form as possible. On the other hand, another group of States felt that the form adopted, on first reading, should be maintained; the draft principles could provide necessary guidance to States in negotiating treaties or agreements on specific sectors of activity or covering particular areas in which such activities may take place. Any other form, according to this view, would be inconsistent with the general and residual approach that the Commission has adopted and which States in general also endorsed. The matter of form on which the Commission reserved its position at the time it adopted the draft principles in the first reading thus remains to be considered before the Commission concludes its second and final reading. The Special Rapporteur addresses this matter in section C of the present report.

B. Clarifications on some issues raised

5. In their comments, States also sought other clarifications. For example, some delegations questioned the decision of the Commission to bring the regime proposed into play only in the case of significant damage.[19] Moreover, whereas the draft principles deal with hazardous activities within its scope, the view was expressed that it would be useful to have an illustrative list of these activities in the commentaries.[20] It was also suggested that the scope of the draft principles be broadened to include liability for transboundary harm caused to neutral States in case of war between two or more States; liability arising from hazardous activity engaged in by terrorists and liability arising from storage of water in dams.[21] Other

[18] A/CN.4/549/Add.1, para. 65. See also the written comments of the Netherlands, the Czech Republic, Mexico, the United States of America and Uzbekistan in A/CN.4/562, sect. F. According to these comments, while the basic thrust of the draft principles is acceptable, they may be improved or the points at issue may be better clarified and some specific suggestions have also been made. The United Kingdom of Great Britain and Northern Ireland noted, with respect to principle 5, that the draft principle is not clear enough on the basis of the duty of States to take response measures; further, principle 4 should have a requirement imposing a duty on the operator to take remedial action, as the European directive did; with respect to principle 7, that it is important to encourage non-binding instruments both as between States and as between non-State entities, as agreement on binding instruments is not always easy; and with respect to principle 8, that the matter of implementation is a domestic matter and should not be part of the draft principles (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

[19] See the written comments of the Netherlands in A/CN.4/562, sect. C. The Nordic countries also objected to the use of the threshold "significant" in defining damage coming within the scope of the draft articles (see A/CN.4/549/Add.1, para. 73). See also written comments of Pakistan in A/CN.4/562, sect. A. The United Kingdom of Great Britain and Northern Ireland, on the other hand, suggested that the threshold be raised to "serious harm" and to only a foreseeable serious harm (comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006).

[20] See the written comments of Pakistan in A/CN.4/562, sect. A.

[21] Ibid.

clarifications sought relate to the definition of terms, particularly the broad definition of damage; the relationship between draft articles on responsibility for internationally wrongful acts and the right of a State to sue as a victim for damage done to public property; methods and means by which prompt and adequate compensation could be achieved; and the role of the "polluter pays" and precautionary principles. One viewpoint desired that the regime proposed not result in multiplicity of claims,[22] and such multiplicity of claims could be the result of claims of compensation for the same cause of action against the operator and the State in the same jurisdiction or claims against the State in one jurisdiction and against the operator in another jurisdiction or against the operator in multiple jurisdictions at the same time. Another viewpoint sought clarification of the status of the draft principles and felt that the exercise of the Commission went beyond codification and progressive development in the traditional sense.[23] It was pointed out that the draft principles were "clearly innovative and aspirational in character and not descriptive of current law and State practice".[24]

6. The Special Rapporteur considers it appropriate to dispose of some of these matters in the following paragraphs.

1. Question of threshold

7. Starting first with the point made that no threshold should be prescribed in the case of transboundary damage even if such threshold is considered useful and necessary for the purpose of the draft articles on prevention, it suffices to note that this matter has been discussed at various stages in the consideration of the topic, particularly before it was divided into two parts, prevention and liability, and at all stages a threshold was considered necessary.[25] In this connection, it must be observed that, with the possible exception of radioactive contamination, States in their mutual relations tolerate some measure of pollution and it is generally perceived that such pollution becomes actionable only if it is significant.[26] While the threshold of "significant" has gained currency and acceptance in the context of the

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[22] See written comments of the Czech Republic in A/CN.4/562 and the statement of the United Kingdom in A/C.6/59/SR.18 and Comments of United Kingdom of Great Britain and Northern Ireland, 27 February 2006.

[23] See the statement of the United Kingdom in A/C.6/59/SR.18. See also A/CN.4/549/Add.1, para. 62.

[24] See the written comment of the United States of America in A/CN.4/562, sect. A.

[25] See A/CN.4/487, paras. 87-98. While Robert Quentin-Quentin Baxter proposed a higher threshold of "substantial harm", draft article 2 (a), provisionally adopted in 1994, suggested a lower threshold, "significant harm", which the 1996 Working Group of the Commission approved. It was then clarified that the concept of "significant" harm refers to more than "detectable" or "appreciable" harm, but to less than "serious" or "substantial" harm. Further, it was defined to mean a harm that is not *de minimis*, or that is not negligible (ibid., para. 97, fn. 128). It was further suggested that given the fact the topic is dealing with activities that are not prohibited by international law, the threshold could not be placed any lower than that (ibid., para. 97).

[26] See Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford, OUP, 2000), p. 176. Rene Lefeber, in *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, Kluwer Law International, 1996), pp. 86-89, notes the need felt for a threshold and examines the rationale for and the possible ways of explaining the meaning of the threshold of "significant harm". See also J. G. Lammers, *Pollution of International Watercourses* (Martinus Nijhoff Pub. 1984), pp. 346 and 347, and R. Wolfrum, "Purposes and Principles of International Environmental Law", *German Yearbook of International Law*, vol. 33 (1991) 308-330 at 311. See also 1990 United Nations/Economic Commission for Europe Guidelines on Responsibility and Liability Regarding Transboundary Water Pollution.

topic of international liability, it is clear that it "denotes factual and objective criteria and involves a value judgment which depends on the circumstances of a particular case and the period in which such determination is made".[27] Thus, a deprivation which is considered to be significant at one time or in one region may not necessarily be considered to be so at another time or in another region. The matter of specifying a threshold is therefore a matter of policy that has received considerable support within the Commission throughout the consideration of the topic. Further, the point that bears repeating is that the threshold is designed to prevent frivolous or vexatious claims and is defined so as to practically allow all claims that involve more than a negligible amount of damage. In view of this, there appears no strong reason to reverse the approach adopted by the Commission with respect to maintaining the threshold of "significant" in respect of the liability aspects of the topic.

8. A separate point is also made that prescribing a threshold might be in violation of the principle of non-discrimination. This point is made on the assumption that nationals of States of origin would stand to be compensated even for trivial damage while the victims of transboundary damage would be entitled to compensation only in the case of significant damage. This might be more of a theoretical than a present or practical problem in the absence of any evidence in State practice. In any event, international law does tolerate certain forms of discrimination in treatment between nationals and foreigners. To the extent that treatment conforms to the minimum standard of treatment sanctioned by international law, which in this case is the principle of compensation for significant transboundary damage, it may be argued that there is no violation of the principle of non-discrimination if, under national law, nationals are given the right to claim compensation even without having to suffer significant damage.[28] Under a different perspective, it cannot be ruled out that a State may even grant foreigners the same treatment as it provides to its nationals, both as a matter of the application of the principle of non-discrimination and by choosing to apply to foreign victims a better standard than is required or mandated by international law.[29]

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[27] A/CN.4/487, para. 98.

[28] Brownlie observed in a different context but commenting on the standard of national treatment that "(A)ccess to the courts may be maintained, but with modified rules in ancillary matters: thus an alien may not have access to legal aid and may have to give security for costs. More general variations may of course be created by treaty. The various standards of treatment commonly employed are as follows: those of reciprocity, the open-door, good neighbourliness, and of identical, national, most-favoured-nation, equitable, and preferential treatment." Ian Brownlie, *Principles of Public International Law* (Sixth Edition, 2003, p. 502. Oscar Schachter, "International law in Theory and Practice", General course in Public International Law, *Recueil des Cours*, 1982, vol. 178 (1985-V), p. 321 notes that while equality for treatment is a laudable norm, "it does not justify international liability for State action based on conditions of transnational business and the economic policies of the States concerned." On the other hand, he believed that "the non-discrimination principle should require liability and preventive measures by States that sustain discrimination based on social prejudice or that act against foreign nationals in retaliation for policies of their governments".

[29] One may also note that international law as a result of the highly developed law of human rights provides certain minimum standards of treatment for foreigners in national jurisdictions, without discrimination between nationals and foreigners and treating them all as individuals deserving of protection of their human rights (see A. Cassese, *International Law* (Oxford, OUP, 2005), Second Edition, p. 122 and M. N. Shaw, *International Law* (Cambridge, CUP, 2005) Fifth Edition, p. 736.

2. Clarification on list of activities falling within the scope of the topic

9. Secondly, on the need to specify a list of activities which may be considered as coming within the scope of draft principles, it is appropriate to refer to paragraph 3, of the commentary to draft principle 1.[30] The matter of specifying a list of activities was carefully considered by the Commission and it decided against it. It is clarified that it is difficult to capture various elements that constitute risk-bearing activities, risk being "primarily a function of the application of particular technology, the specific context and the manner of operation".[31]

3. Expansion of the scope of the topic

10. Thirdly, we may consider the possibility of broadening the scope of the draft principles to include liability arising from the conduct of war on account of damage caused to neutral States, "hazardous activity caused by terrorist activity" and "transboundary damage caused by any benign activity, such as storage of water in dams".[32] It has to be recalled that from the very beginning the topic was conceived to address only "activities not prohibited by international law", and activities wrongful per se were excluded.[33] It covers activities which involve a risk of causing significant harm by virtue of their physical consequences. In 1996, before the draft articles on prevention were adopted, the Working Group of the Commission recognized that the outcome would embrace activities with a continuing operation and effect.[34] As noted in the commentary to draft principle 4, operator's liability is exonerated where damage is the result of an act of war. In several instruments liability is excepted where damage occurs as a result of an act of armed conflict, hostilities, civil war or insurrection. Under some national legislation acts of terrorism also exonerate liability.[35] On the other hand, it has been the understanding that a reservoir which is perfectly safe could become dangerous as a result of an earthquake, and consequently the continued operation of such a reservoir would be an activity involving risk. Storage of water in dams could therefore be a risk-bearing activity and may be considered as covered within the draft principles, unless

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[30] See also commentaries, *supra* note 15, principle 1, commentary, para. (3).

[31] Ibid. See also, however, fn. 350, for a reference to conventions which specify the type of activities that could come within the scope of the draft principles.

[32] See the written comments of Pakistan, in A/CN.4/562, sect. A.

[33] Briefly, it may be noted that if damage occurred as a result of the act of a State party to a conflict considered to have engaged in use of force in violation of the prohibition contained in customary law, such as was held to be the case with the Iraqi invasion of Kuwait, it is responsible for the damage. On the other hand, in the case of a State which is engaged in the conflict in rightful exercise of self-defence, there could be a cause of action for compensation if it violated applicable laws of war. But the problem is that claims concerning conflict usually remain unresolved with no possible determinations to be made as to wrongfulness of the use of force involved and the legality when any particular target is destroyed. For an interesting analysis, see Jay E. Austin and Carl E. Buruch, "The Kosovo Conflict: a case study of unresolved issues", in Jay E. Austin and Carl E. Buruch (eds.), *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (Cambridge, CUP, 2000), pp. 647-664.

[34] *Yearbook of the International Law Commission, 1996, Vol. II (Part Two)*, A/51/10, annex I, para. (23) of commentary to article 1. See also A/CN.4/487, para. 111 (c), and article 2 (a) of the draft articles on prevention, specifying only activities with a "risk of causing significant transboundary harm" as coming within its scope.

[35] Commentaries, *supra* note 15, principle 4, commentary, para. (27). See also A/CN.4/543. See also sixth annex to the Madrid Protocol to the Antarctic Treaty.

excluded by the parties to a convention or a treaty which also governs the same subject matter, in a case of a dispute.

4. Damage to environment per se and claims of compensation for damage to "non-use" values

11. Draft principle 2 defines damage, and damage to environment per se is included along with damage to persons and property in paragraph (a). In paragraph (b), environment is broadly defined to encompass "characteristic aspects of the landscape". It must be noted that the definition refers only to the environment within national jurisdiction and control, and excludes environment as it pertains to global commons.

12. Three different sets of issues were highlighted in the observations made by Governments concerning the environment. First, it has been noted that the definition of environment in draft principle 2 did not include damage to global commons.[36] It may be recalled that the Special Rapporteur recommended that damage to global commons should be addressed within the scheme of the draft principles insofar as it can be traced and linked to the hazardous activities coming within the scope of the draft articles on prevention.[37] However, the Commission, on the basis of the recommendation of the Working Group set up at the fifty-sixth session,[38] decided to exclude issues concerning global commons. While it was recognized that such issues were important, it was considered best to deal with global commons separately because it raised its own peculiar problems in relation to standing to sue, proper forum, applicable law and quantification of damage.[39] The Special Rapporteur is convinced that these issues cannot properly be analysed within the economy of the present draft principles, where the focus is transboundary harm within the territories of the States concerned and involving their nationals and resources.

13. Secondly, some Governments viewed the definition of environment to be broad. It has to be acknowledged that the world community has come to recognize the value of the environment and the need to be ever vigilant and assess, on a continuous basis, the adverse impact of various human activities on the environment. In adopting a holistic definition of environment, the Commission was guided by the dictum of the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project*.[40] Besides, several recently concluded conventions on the subject have dealt with the concept of harm to the

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[36] A/CN.4/549/Add.1, para. 61. See also statements by New Zealand and Mexico in A/C.6/59/SR.18 and 25 and comments by the Netherlands in A/CN.4/562, sect. D.

[37] See A/CN.4/540, para. 36 (8).

[38] See A/CN.4/661, para. 2.

[39] On the difficulties surrounding the issue of damage to the global commons, such as standing and the proper legal basis for a claim, see: Jonathan I. Charney, "Third State Remedies for Environmental Damage to the World's Common Spaces", in Francesco Francioni and Tullio Scovazzi (eds.) *International Responsibility for Environmental Harm* (London, Graham and Trotman, 1991), at p. 150, Xue Hanquin, *Transboundary Damage in International Law*, (Cambridge, CUP, 2003), at pp. 236-269, Kathy Leigh, "Liability for Damage to the Global Commons", 14th Australian Yearbook of International Law, 1992, p. 129.

[40] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports*, 1997, p. 7, para. 140. Commentaries *supra* note 15, principle 2, commentary para. (15).

environment.[41] As a minimum, damage to the environment relates to claims involving reasonable measures of response and restoration,[42] including clean-up costs and compensation for damage arising from impairment of environment insofar as it resulted in loss of income directly deriving from an economic interest in any use of the environment.[43] Given contemporary concern for the environment, the Special Rapporteur is of the view that the definition of environment is best cast in broader terms in a liability regime which is general and residual to "attenuate any limitation imposed under liability regimes on the remedial responses acceptable".[44]

14. Thirdly, recognizing the value of the approach adopted by the Commission, some Governments expressed their wish to go even further to include and make admissible claims against "non-use value" of the environment. There is some support for this claim from the Commission itself: it adopted its draft articles on State responsibility, even though it is admitted that such damage is difficult to quantify.[45] The recent decisions of the United Nations Compensation Commission, in opting for a broad interpretation of the term "environmental damage" are a pointer of developments to come. In the case of the F-4 category of environmental and public health claims, the F-4 Panel of the Compensation Commission allowed claims for compensation for damage to natural resources without commercial value (so-called pure environmental damage) and also claims where there was only a temporary loss of resource use during the period prior to full restoration.[46] The broader definition of environment in the context of the draft principles opens possibilities for further developments of the law in the liability aspects.

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[41] Ibid., principle 2, commentary, para. (13), and ibid., fn. 383.

[42] In respect of restoration, the point is well accepted that it should aim at recreating the conditions existing prior to the occurrence of damage. Where that is not possible, costs incurred to introduce, where appropriate, elements of equivalent value are admissible. See commentary, *supra* note 15, principle 2, commentary, para. 19. For sanctioning of three compensation projects (for loss of rangeland and habitats Jordan got $160 million, for shoreline preserves Kuwait got $8 million and Saudi Arabia got $46 million) by way of replacing ecological services that were irreversibly lost in the wake of the 1991 Gulf War (see panel report F4/5, Technical Annexes I-III, cited at fn. 41, Peter H. Sand, "Compensation for Environmental Damage from the 1991 Gulf War", *Environmental Policy and Law*, vol. 35/6 (2005), pp. 244-249, p. 247).

[43] Commentaries *supra* note 15, principle 2, commentary paras. (18)-(21).

[44] Ibid., principle 2, commentary, para. (16).

[45] See *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), article 36, commentary, para. (15): "environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs and property devaluation. Damage to such environmental values (biodiversity, amenity, etc. sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify." See also James Crawford, *The International Law Commission's Articles on State Responsibility (Introduction, Text and Commentaries)*, (Cambridge, CUP, 2002), at p. 223.

[46] See S/AC.26/2005/10. See also Peter H. Sand, *supra* note 42, p. 247 set out in five instalment reports, the awards recommended by the F-4 Panel and approved without change by the Governing Council add up to $5.26 billion, "the largest in the history of international environmental law" (ibid., p. 245). See also the guidelines for the follow-up programmes for environmental awards of the United Nations Compensation Commission, Environmental Policy and Law, vol. 35/6 (2005), pp. 276-281.

5. Multiplicity of claims

15. Multiplicity of claims may be envisaged in a number of scenarios. In one instance, claims may be filed by a plaintiff for the damage suffered in one jurisdiction, against the State of origin for failing to discharge its obligations of due diligence and against the operator for causing the transboundary damage. The two underlying assumptions are that there is failure to observe duties of due diligence on the part of the State of origin and that failure to observe duties of due diligence did not come to the notice and could not be relied upon by the affected States and individuals until damage actually occurred.[47] Normally, if such failure had been noticed before the damage occurred, representations could have been made to the State by other concerned States and natural or legal persons to press it to perform the obligations it owed to them under international law. Most of the obligations of due diligence incorporated in the draft articles on prevention are regarded as part of customary law[48] and non-performance of any one or more of them would preclude the State of origin from asserting that the harm did not occur for want of due diligence.[49] In such a situation, State responsibility and liability of the operator would provide a basis for the claims. To the extent that there may be claims involving the same cause of action against the State and the operator, the case of multiplicity of claims is a real possibility. While State responsibility claims could lie between States, operator liability could engage the victims of damage qua natural and legal persons as plaintiffs and the operator as the respondent. Whether the claims against the State should be entertained after exhausting the claims against the operator, sometimes given the limits of liability set, or as a separate and independent charge, is a matter of debate and perhaps could also be determined by the circumstances of the case.

16. Such a multiplicity of claims however can be handled by Courts first by clubbing them, and sorting out the responsibility of the State on one hand and the liability of the operator on the other. To the extent that no direct causal link could be established between the State responsibility and the damage, the State may be required to express apology and give guarantees of performance. To the extent that there is material damage due to its non-performance, the State would have to compensate the loss suffered by the plaintiffs. As for the operator, he would be liable for the damage caused within the limits of his liability. In any case, the compensation to be received by the victims on both these accounts could not be more than the actual quantum of loss suffered by them as assessed by the courts.

17. In another scenario, multiplicity of claims arises from the fact of filing different claims for the same damage involving the same plaintiff in different jurisdictions. Here, there is a need to prevent legal action from proceeding at the same time in different jurisdictions. The 1968 Brussels Convention on Jurisdiction

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[47] If the failure to observe the obligations of due diligence by the State of origin had come to the notice of the concerned States or persons and if they did not press for the observance of those obligations within a reasonable period of time, whether State responsibility could still be engaged later at the stage of consideration of claims of compensation is a matter of doubt. There is authority to say that in such cases the individuals and the States concerned would be estopped from raising issues of State responsibility (see Phoebe, Okowa, *State Responsibility*, ..., *supra* note 26, p. 169).

[48] See Patricia Birnie and Alan E. Boyle, *International Law and the Environment* (Oxford, OUP, 2002), Second Edition, p. 113.

[49] Phoebe Okowa, *State Responsibility*, ..., *supra* note 26, p. 169.

and the Enforcement of Judgments in Civil and Commercial Matters provides one set of solutions. This set of solutions has been generally endorsed in a more recently proposed 2001 draft convention on jurisdiction and foreign judgements in civil and commercial matters, submitted to the first part of the diplomatic conference held at The Hague. While postulating priority for the jurisdiction of the contracting party in which the defendant is domiciled,[50] in the case of an environmental tort claim an alternative ground of jurisdiction is provided. This is the forum of the State where an act or omission causing injury took place or before the courts of the State where the damage arose.[51] Thus, the claimant is provided with a choice as to the forum which he or she deems most appropriate for him or her. The provision of such a choice is considered to be based on "a trend now firmly established in both Conventions on international jurisdiction and in national systems".[52]

18. In the matter of choice for transboundary victims between the law of the State of origin[53] and the law of the State of the victim,[54] there is considerable support for the principle that the law that is most favourable to the victim should be applied. The "most favourable law principle", according to the authors of the second report on transnational enforcement of environmental law to the 2004 Berlin International Law Association Conference, is adopted in several jurisdictions in Europe, Venezuela and Tunisia and possibly even in China.[55] Several authors and even those who do not normally favour this principle in all transboundary tort cases favour it in transfrontier pollution matters.[56] However, United States law appears to favour the law of the place which has the "most significant relationship" with the event and the parties.[57] In spite of the lack of total uniformity in national laws and practice, it appears to be a sound policy to adopt the "most favourable law principle" as it has

[50] This is based on the principle, which promotes the policy that the defendant is best able to defend himself or itself in the courts of the State in which he or it is domiciled. This is justified on the ground that the force of a judgement is directed against the defendant. However, while the domicile of the natural person is left to be determined by the law of each State, the case of the nationality of the legal persons or the corporation is not so well defined. The Brussels Convention and the parallel Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters "leave the determination of domicile to the law that is determined by the law of conflict of laws as administered by the courts of the State where the claim is filed" (see C. van Bar, "Environmental Damage in Private International Law", *Recueil des Cours*, vol. 268, (1997) 295-411, at p. 336).

[51] See the second report (by Christophe Bernasconi and Gerrit Betlem) on Transnational Enforcement of Environmental Law, International Law Association, Berlin Conference (2004), Report of the Seventy-first Conference, Berlin, 2004, pp. 896-938, p. 900. A defence against the ground of jurisdiction is, however, admissible if it can be established that damage in the State, not being the State of origin, is not foreseeable.

[52] Ibid., p. 899.

[53] Ibid., p. 914. Austria, Denmark, Finland, Sweden, Japan adopt the law of the place of the dangerous activity (*lex loci actus*).

[54] Ibid., France, the United Kingdom, Spain, Romania, Turkey, and most recently, the Netherlands adopted the law of the place of the damage (*lex damni*). Quebec in Canada has similar legislation.

[55] Ibid., p. 911.

[56] Ibid.

[57] Ibid., pp. 914-915. Under para. 2 of rule 145, of the Restatement, second, Conflict of Laws, issued in 1971, "contacts" to be taken into account are the place of damage, the place where the act that give rise to the damage was committed, the domicile, the residence, the nationality, the place of incorporation, or of the principal place of business of the parties, and the place where any relationship between the parties is centred.

the advantage of raising the level of protection to the environment and provide some sort of incentive for the operator to engage in better maintenance of his or her installation.[58]

6. Legal status of the draft principles

19. On the legal status of the draft principles, while few States have expressed their position, some delegations favour casting the draft principles in the form of draft articles. This implies a readiness to accept some or most of the principles, at a minimum, as *de lege ferenda*, as evidence of consistent State practice. Clearly, some other delegations would like to treat the draft principles as purely aspirational.

20. There are obvious difficulties in identifying the legal status of the draft principles. First, in their very nature, authoritative assertions cannot be made convincingly that a principle is part of general international law merely on the basis that it has been adopted repeatedly by States as agreed provisions in texts of treaties. The difficulty would arise, for example, if the treaties concluded have not come into force or do not have any chance of coming into force. Even if they are in force, on the face of it and without more,[59] they could at best be treated as mere expressions of bilateral and multilateral accommodation and as such applicable only as between the parties to the treaties concerned. Hence, they cannot be regarded by themselves as giving rise to a general principle of international law.

21. In the case of customary law, the problem of showing consistent and uniform practice of States is itself very complicated, principally because of lack of agreement on what constitutes relevant practice. The burden of proving *opinio juris* accompanying such State practice is even more complicated, for States do not normally announce their intentions when they follow a certain practice. Assessment of *opinio juris* therefore involves subjective analysis at two levels: the level at which the State itself has to make a judgement before electing to follow what it perceives to be a consistent and uniform practice and the level of the decision-maker/observer, regarding whether States are indeed following that practice out of a conviction that it is mandatory and not merely because they find the practice convenient or expedient to follow. This makes the assessment of customary law with respect to any one principle that much more difficult.[60] Aside from the difficulties noted, as a matter of practice, despite its mandate under article 15 of its Statute, the Commission does not normally differentiate the recommendations it adopts into

[58] Ibid., p. 910.

[59] See R. R. Baxter, "Treaties and Custom", *Recueil des Cours*, Vol. 129, (1970-1), pp. 31-104, at pp. 101-102. While acknowledging the difficulties inherent in looking at treaties as conclusive evidence of customary law, Professor and later Judge Baxter pointed out that each one of the multilateral and bilateral treaties "must be weighed in balance with other evidence of customary law before the rule of international law may be ascertained". According to him "the task is easiest in the case of the law-declaring treaty, such as a codification treaty ... Even a draft of a treaty or a treaty which has not yet entered into force will have influence ... The amount of deliberation that has gone into the text, the number of participants in the process of establishing the text of the treaty, and above all, the fact that it represents, relative to the rest of the evidence of the law, a clear and uniform statement of the law commend it non-parties. It is evidence that is easy to use".

[60] Patrick Daillier, Alain Pellet, *Droit International Public* (Paris, L.G.D.J. 1999) 6th edition, pp. 330-331. See also Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems", EJIL Vol. 15, (2004), pp. 523-553.

those that belong to the codification of existing international law on the one hand and to the progressive development of law on the other.[61]

22. In spite of the difficulties inherent in any exercise concerning the assessment of the legal status of the draft principles, the legal value of the principles which found repeated assertion in different national legislations and treaty formulations as evidence of a predominant trend in international law endorsing some common policy preferences cannot be underestimated.[62] The presumption in favour of *opinio juris* is strong when States choose to repeat certain formulations while rejecting other possible formulations, when they are open to be adopted, because the formulation chosen has already found wide acceptance among States. It has been pointed out that the Commission did not shy away from codifying customary principles of the law of the sea on the basis of uniform national legislation and comments of States.[63] It has also been noted that there is legal value to the effort of the Commission when it "consolidates developments in a particular area of law and makes them part of the *droit acquis*".[64]

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[61] See generally, Ian Sinclair, *The International Law Commission* (Cambridge, CUP, 1987), p. 7. There was extensive discussion on the basic mandate of the Commission stated in article 1 of its statute: the object of promoting progressive development of (primarily public) international law and its codification. It is understood from the beginning of its work that a strict distinction between progressive development and codification cannot be maintained either for the purpose of choosing the methods of procedures of work or for formatting its final recommendations. It is even more difficult, as the experience of the Commission showed, to neatly separate its conclusions into those that belong to one category or the other. Sinclair noted that the Commission, at a fairly early stage in its labours, more or less abandoned the attempt to maintain a clear distinction between projects involving "progressive development" and projects involving "codification". H. W. Briggs pointed out that by the time of its 1956 report in "preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between the two activities [codification and development] can hardly be maintained" (H. W. Briggs, *The International Law Commission* (Ithaca, New York, Cornell University Press, 1965), p. 140). See also Ahmed Mahiou, Rapport Général, in Colloque d'Aix-en-Provence: *La Codification du Droit International* (Pedone: SFDI, 1999), p. 19.

[62] A/CN.4/543, para. 6, makes a pertinent point in this regard: "The Study has not ignored the difficulties of evaluating a particular instance as 'evidence' of State practice. Different policies may motivate the conclusion of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritativeness of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Whether or not the materials examined here are established as customary law, they demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of liability relevant to the topic. Practice also demonstrates ways in which competing principles, such as 'State sovereignty' and 'domestic jurisdiction', are to be reconciled with the new norms." See also R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" BYBIL, Vol. 41 (1965-66) 275, where he noted the legal value of the Geneva Convention on the Law of the Sea, 1958, as a source of law for those States that had not yet become parties to them.

[63] Ian Brownlie, *Principles*, ..., *supra* note 28, p. 384. This happened according to the author in the case of the law of the sea, where the Commission relied mostly on national legislation and comments of Governments.

[64] See the view of Professor James Crawford quoted in Alan Boyle, "Globalizing Environmental Liability: The Interplay of National and International Law", *Journal of Environmental Law*, Vol. 17 (2005), pp. 3-26, 3, at p. 19.

III. Review of some of the salient features of the draft principles

23. The draft principles adopted by the Commission on the first reading in 2004 are the result of careful assessments of trends concerning developments on the topic over a long period of time. The strength of the policy they represent and their legal value have been the subject of repeated discussion within the Commission and widely endorsed conclusions have provided the basis for their formulation. Some of the salient provisions have also received recognition as general rules of international law, even if that status is reserved to some of them at some high level of generality and no uniformity in State practice could yet be deduced with regard to the implementation of specific elements associated with the general concepts. At this point it may be instructive to review some of the salient features of the draft principles and their legal status in the light of State practice, judicial decisions and the views of commentators.

A. Precautionary approach or principle

24. This is for example the case with the "precautionary approach" adopted as principle 15 of the Rio Declaration. Some States treat this as a principle, whereas global agreements refer to it as precautionary measures. The difference in the use of terminology is not important, even though it is used with different nuances.[65] This is a principle or approach which States are required to respect in the implementation of their due diligence obligations incorporated in the draft articles on prevention of transboundary harm arising out of hazardous activities authorized to take place within the territory or under control of the State of origin. Even though it is a principle which essentially arose out of the European practice,[66] as a principle or approach of prudent management of economic development and exploitation of natural resources and biodiversity consistent with environmental protection, it is embraced worldwide.[67] Its significance and legal status may be explained thus:

> Although it is evolving, the precautionary principle appears as a standard of international law at the doctrinal level as well as in practice ... but dissent

[65] According to Sands, the language of principle 15 of the Rio Declaration now attracts broad support (see Sands, *Principles of International Environmental Law* (Cambridge, CUP, 2003) 2nd Edition, at p. 268. See also generally Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford, OUP, 2002), pp. 91-223).

[66] In fact it was an approach that was first adopted in German law: see Bochmer-Christiansen, "The precautionary principle in Germany — Enabling government", in T. O'Riordan and J. Cameron (eds.), *Interpreting the Precautionary Principle* (London, Earthscan Publications, 1994). Article 174 (2) of the European Community Treaty provides that the Community policy on the environment "shall be based on the precautionary principle and on the principles that preventive action should be taken". In fact it has been endorsed by the European Court of Justice in *Case C-180/96P, U.K. v. Commission*, [1996] ECR I-3903 and in *Case T-76/96 R, National Farmers' Union*, [1996] ECR II-815. The precautionary principle has been endorsed by almost all international instruments on the environment since 1992 (see Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Ardsley, NY Transnational Publishers, 2004), Third Edition, at p. 207).

[67] The ICJ in the *Gabčíkovo-Nagymaros Project case* did not pronounce on the matter, even though Hungary raised it and Judge Weeramantry referred to it with approval in his dissent. See Birnie and Boyle, *International Law ...*, *supra* note 48, pp. 118.

remains on either side of the spectrum (the European and the U.S.) considering the principle as a guideline or claiming its binding force.

...

Key elements of such a regime would be following objective risk assessment procedures, defining socially acceptable level of risk, continuing scientific research and re-examining the precautionary measures as information becomes available. The issue of burden of proof remains perhaps the most controversial aspect of the precautionary principle as reversing the burden of proof is often considered the foremost expression of the principle.

...

It is important that the status of the principle as a standard is not necessarily a step on the way to the creation of a rule. The fact that a treaty makes it a rule to use precaution does not alter the nature of precaution as a standard. The reference to reasonableness in domestic law, for example, derives its force from being a standard of judgement and cannot become a hard-line rule. International standards operate in a similar way. The precautionary principle will therefore gain its legal value from being refined by negotiators and interpreted by adjudicators rather than being turned into a traditional rule.[68]

25. A set of guidelines has been developed to help policymakers and decision makers to apply the precautionary principle. These guidelines urge that while best available information may be used, which may be obtained from multiple independent and publicly accountable institutions without conflict of interest, in arriving at decisions, all social and economic costs and benefits of the application of the principle of precaution must be kept in view.[69] As noted by a learned commentator, debate about the legal status of the principle or approach is to a certain extent "too simplistic", and the reality is judicial tribunals and policymakers are paying attention to the principle and applying it to particular contexts with significant effect.[70]

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[68] Sonia Boutillon, "Precautionary Principle: Development of an International Standard", *Michigan Journal of International Law*, vol. 23 (2002), pp. 429-469, pp. 468-469. A similar, yet not identical, view is expressed by McIntyre and Mosedale, who assert that "the precautionary principle is therefore a tool for decision making in a situation of scientific uncertainty, which effectively changes the role of scientific data" (see McIntyre and Mosedale, "The Precautionary Principle as a norm of customary international law", *Journal of Environmental Law*, vol. 9 (2) (1997), at p. 222). The view that the principle reflects customary law has been expressed by Sands, see Sands, *Principles ..., supra* note 65, at p. 274.

[69] Guidelines on Precautionary Principle in the Context of Biodiversity Conservation and Natural Resource Management, prepared under a joint initiative of Fauna and Flora International, IUCN-the World Conservation Union, Environmental Policy and Law, vol. 35/6 (2005), pp. 274-275, at p. 275.

[70] For the application of the principle in the Indian context, see *Andhra Pradesh Pollution Control Board v. M. V. Nayudu*, 2002 (2) SCC 62. The issue involved was whether a hazardous industry should be allowed to continue in the face of a possible contamination of underground water from the effluents of the plant. The High Court of Andhra Pradesh relied on the expert evidence of the industry and allowed its operation. On an appeal, the Supreme Court, having obtained scientific evidence from wider sources and independent expert bodies, reversed the High Court permission and stopped the operation of the industry because the scientific evidence indicated a greater possibility of underground water contamination with nickel deposits being released by the effluents of the plant. The Indian Law Commission noted that the precautionary principle

26. Thus, the growing role of the precautionary principle in the context of application of the draft principles on allocation of loss during the process of occurrence of transboundary damage and after the damage has taken place remains to be seen. It is clear that during the process of occurrence of harm, the State of origin has the duty to ensure and if necessary undertake, on its own or in cooperation with the operator and other concerned and competent organizations, all appropriate response measures to mitigate the effects of harm. In this effort it is required to use the best available technology. Wolfrum regards this as a duty directly connected with the application of the precautionary principle or approach.[71] The principle or approach, as already noted, has important implications in the context of making and deciding on the claims of compensation or as part of remedies that should be available to victims. For example, the suspension or closure of the activity once damage has occurred or even when threatened according to the best but quite possibly not definitive scientific evidence available, until it is cleared once again as environmentally sound, is one remedy. Accordingly, in making or deciding on the claims, particularly claims for the closure or suspension of a hazardous operation in progress, the principle of precaution appears to bear upon the standard of proof required and on reversing the burden of proof.[72]

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clearly applied here and that with "more data and by application of better scientific procedures, or better technology more accurate conclusions can always be arrived at" (Law Commission of India, One Hundred Eighty-sixth Report on Proposal to Constitute Environment Courts, September 2003, p. 18, available at http://lawcommissionofindia.nic.in/reports).

[71] On the requirement of best available technology, Rudiger Wolfrum noted that it is closely associated with the precautionary principle (see Rudiger Wolfrum, "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance"), in Fred L. Morrison and Rudiger Wolfrum, *International, Regional and National Environmental Law* (Kluwer Law International, 2003), p. 15. It is also suggested that the term "available" means that "States are responsible for applying those technological advances that have already been marketed, as opposed to every new development in pollution control" (see Peter-Tobias Stoll, "Transboundary Pollution", in Fred L. Morrison and Rudiger Wolfrum, pp. 169-200, p. 182).

[72] See, for an understanding of the application of the precautionary principle, D. Freestone, "The Road from Rio: International Environmental Law after the Earth Summit", *Journal of Environmental Law*, vol. 6 (1994), 193, at p. 211. For a mention of some instances of suspension, see Birnie and Boyle, *International Law ..., supra* note 48, p. 118. The International Tribunal for the Law of the Sea suspended further exploitation of bluefin tuna in the face of scientific uncertainty surrounding the conservation of tuna stocks pending the resolution of the dispute (see *Southern Bluefin Tuna cases (Provisional Measures) (Australia and New Zealand v. Japan)*, ITLOS, nos. 3 and 4 (1999), cases. For closure of activity, see the *A. P. Pollution Board Case, 2001 (2) supra* note 70. Sadeleer notes that the precautionary principle should shed new light on the duty of care and lessen the severity of having to prove causation (Nicolas de Sadeleer, *Environmental Principles ..., supra* note 65, p. 212).

B. "Polluter pays" principle: strict and limited operator's liability

27. There is a strong case to assert that, under customary international law, operator's[73] liability for damage arising from ultrahazardous activities is strict but limited. Operator's liability gained ground for several reasons and principally on the basis of the belief that one who created high risks seeking economic benefit must bear the burden of any adverse consequences of controlling the activity. This also came to be called in broad terms the "polluter pays" principle. While the "polluter pays" principle itself cannot be termed as having acquired the status of a general principle of international law,[74] operator's liability for ultrahazardous activities

[73] The draft principles envisage the definition of "operator" in functional terms and it is based on the factual determination of who has use, control and direction of the object at the relevant time. Such a definition is generally in conformity with notions prevailing in French law. See Elspeth Reid, "Liability for Dangerous Activities: A Comparative Analysis", ICLQ, vol. 48 (1999), pp. 731-756, p. 755. More generally, it is pointed out that while no basic definition of the operator generally applied has been developed, "recognition has been gained for the notion that by operator is meant one in actual, legal or economic control of the polluting activity". See Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (Kluwer Law International, 1999), p. 401. It should be clear, however, that the term operator would not include employees who work in or are in control of the activity at the relevant time. See article 2 (c) of annex VI to the Antarctic Treaty on liability arising from environmental emergencies concluded in June 2005 which States that "'operator' means any natural and juridical person, whether governmental or non-governmental, which organizes activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor or subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organizes activities to be carried out in the Antarctic Treaty area, and does not include a juridical person that is a contractor or subcontractor acting on behalf of a State operator." For the text, see http://www.aad.gov.au. The definition of "operator" employed in principle 2 (e) of the draft adopted by the Commission in 2004 is a functional one. For this and for an illustration of the definitions on "operator" employed in some conventions, see the commentary to principle 2, paras. (26)-(29).

[74] Rudiger Wolfrum notes that "Although the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, and the Convention on the Transboundary Effects of Industrial Accidents both refer in their preambles to the 'polluter pays' principle as being a 'general principle of international environmental law', such view is not sustained in the light of United States practice and also in the light of the uncertainties about its scope and consequences" (see Rudiger Wolfrum, "International Environmental Law", *supra* note 71). See generally Nicolas de Sadeleer, *Environmental Principles ..., supra* note 65, pp. 21-59. However, the "polluter pays" principle has been endorsed or is being endorsed in different national jurisdictions with varying effect. The Indian Supreme Court in the *Vellore Citizens' Welfare Forum v. Union of India*, 1996 (5) SCC 647, ruled that the precautionary principle, and the "polluter pays" principle and the new burden of proof , supported by articles 21, 47, 48A, and 51A (g) of the Constitution of India, have become part of the environmental law of the country" (report of the Indian Law Commission, *supra* note 70, p. 36). Multiple provincial statutes of Canada regarding liability for environmental damage and subsequent remediation recognize the principle. In Spain, the Spanish courts have relied on the principle *cuis est commodum eius est incommodum*, that is, the person who derives a benefit from an activity must also pay for resulting damage, to impose liability on persons for damage caused by mines, waste, damage as result of loss of water, and toxic gas. In Japan, with regard to pollution caused by mining activities and marine pollution, the polluter pays to clean up the contamination to the commons and to restore the victim's property to its pre-damage state. The French legal system endorsed in various forms the "polluter pays" principle. In *Epoux Vullion v. Société Immobilière Vernet-Christophe*, JCP 1971.2.16781, France's *Cour de Cassation* held that "the owner's right to enjoy

could be said to have acquired that status.[75] The case for strict liability for ultrahazardous or abnormally dangerous activities was held to be the most proper technique under both common and civil law to enable victims of dangerous and ultrahazardous activities to recover compensation without having to establish proof of fault on the basis of what is often detailed technical evidence,[76] which, in turn, would require on the part of victims a complete understanding of the complicated and complex operation or activity. The case for strict liability is strengthened when the risk has been introduced unilaterally by the defendant.[77] However, in the case of damage arising from hazardous activities, it is fair to designate strict but limited liability of the operator at the international level as a measure of progressive development of law.[78]

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his property in the most absolute manner not prohibited by law or regulation is subject to his obligation not to cause damage to the property of anyone else which exceeds the normal incommodities of neighbourhood". The new Swedish Environmental Code, 1998, which came into force on 1 January 1999, makes the party who is liable, to a reasonable extent, for pollution to pay for investigations of possible pollution, clean-up and mitigation of damage. The test of reasonableness is determined with reference to (a) the length of time elapsed since the pollution occurred, (b) environmental risk involved, (c) the operator's contribution. Ireland enacted statutes to integrate, into domestic law, international treaties imposing strict liability for oil and hazardous waste spills by ships. It is also preparing to implement the European Directive, 2004, which will become effective by 2007, and which imposed strict liability and the "polluter pays" principle for environmental harm. Irish Courts have already begun to rely upon the "polluter pays" principle. In Brazil strict liability is becoming a standard for damage caused by activities which are hazardous or those that harm or have a risk of causing harm to the environment. Intent need not be proved. Under the National Environmental Management Act, 1998, of South Africa, strict liability is imposed on operators who may cause, have caused or are causing significant pollution, degradation or environmental harm. Singapore provides strict liability for criminal offences and imposes obligations of clean-up on polluters without the need for any intentional or negligent behaviour.

Note: the information concerning different national laws and practice is based on memorandums on national laws prepared by the students of the environmental law class of Professor Dinah Shelton, George Washington University Law School, Washington, D.C., for presentation to and on file with the Special Rapporteur. See also A/CN.4/543.

[75] A/CN.4/543, after reviewing national legislation and practice at the domestic level as it concerned the operation of abnormally dangerous activities or ultrahazardous activities, concluded that "The above review of domestic law indicates that strict liability, as a legal concept, now appears to have been accepted by most legal systems. The extent of activities subject to strict liability may differ; in some countries it is more limited than in others. The legal basis for strict liability also varies from 'presumed fault' to the notion of 'risk', or 'dangerous activity involved', etc. However, it is evident that strict liability is a principle common to a sizeable number of countries with different legal systems, which have had the common experience of having to regulate activities to which this principle is relevant. While States may differ as to the particular application of this principle, their understanding and formulation of it are substantially similar. Strict liability is also increasingly employed in legislation concerning protection of the environment" (para. 112).

[76] See Elspeth Reid, *supra* note 73, p. 756. Also, A/CN.4/543, para. 23.

[77] A/CN.4/543. See also for an interesting review of the concept of liability in civil and common law.

[78] Consider the hesitation exhibited by the Working Group of the Commission in 1996 in designating damage arising from all activities covered within the scope of the draft principles subject to the regime of strict liability. It may be recalled that the Commission noted that the concepts of strict and absolute liability which "are familiar in the domestic law in many States and in relation to certain [that is, ultrahazardous] activities in international law ... have not been fully developed in international law, in respect to a large group of activities such as those

28. The point, however, should be made that in transforming the concept of strict liability from a domestic, national context — where it is well established but with all the differences associated with its invocation and application in different jurisdictions — into an international standard, its ingredients should be carefully defined while keeping its basic objective in view, that is, to make the person liable, without any proof of fault, for having created a risk by engaging in a dangerous or hazardous activity. Such a definition is necessary not only to capture the most positive elements of the concept of strict liability as they are obtained in different jurisdictions, and thus to make the international standard widely acceptable, but also to ensure that the standard adopted truly serves the cause of the victims exposed to dangerous activities, thus facilitating prompt and effective remedies.

29. This can be approached in different ways,[79] for example, by adopting a proper definition of damage as has been done in the case of draft principle 1, which defines damage as damage to person, property and environment. Second, while designating strict liability as the standard for invoking liability, it may be specified that it is meant to include all damage foreseeable in its most generalized form and knowledge of the extent of the potential danger is not a prerequisite of liability. Further, it may be noted as part of application of the rule that it is not open to the operator to plead exemption from the liability on the ground that the use involved is a natural one and it is sufficient if the use posed a risk of harm to the others.

30. Strict liability, of course, allows some defences and international treaties and national legislation which regulate the concept provide for a variety of exceptions.[80] However, in order to highlight the role the "polluter pays" principle could play in the general scheme of the draft principles on allocation of loss, it may be opportune to designate the minimum of such exceptions namely, act of armed conflict, hostilities, civil war or insurrection, act of God or nature and the act of a third party — including the acts of victims (or contributory negligence).[81]

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covered by article 1" (*Yearbook, ... 1996*, vol. II (Part Two) (A/51/10), annex I, paragraph (1) of the general commentary to chapter III). In arriving at this conclusion the Working Group had the benefit of the Survey on liability prepared by the Secretariat (*Yearbook, ... 1995*, vol. II (Part One), A/CN.4/47).

[79] In making the following suggestions, the Special Rapporteur is guided by the helpful observations of Elspeth Reid, *supra* note 73, pp. 741-743. See also Chapter I (B) of the useful Secretariat Survey of Liability regimes, *supra* note 64, paras. 29-260. The Indian Supreme Court, in *M. C. Mehta v. Union of India*, AIR 1987 SC 1086 (the Oleum Gas Leak case), held that in the case of hazardous activities, exceptions which could be pleaded to avoid absolute or strict liability, like unforeseeable damage, and natural use, are not available (see the report of the Indian Law Commission, *supra* note 70, p. 30).

[80] See A/CN.4/543.

[81] Terrorist acts are included in the most recent liability instrument: The sixth annex to the Madrid Protocol to the Antarctic Treaty entitled Liability Arising from Environmental Emergencies. The first section of article 8 of the annex, which deals with the exemptions from liability, reads as follows: "An operator shall not be liable pursuant to article 6 if it proves that the environmental damage is caused by: (a) an act or omission necessary to protect human life or safety; (b) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their potential adverse impact; (c) an act of terrorism; or (d) an act of belligerency against the activities of the operator."

C. Notable obligations of State

31. State liability for transboundary damage for either ultrahazardous activities or hazardous activities does not appear to have support even as a measure of progressive development of law. However, a general principle of international law has clearly emerged requiring the State to perform the obligation of due diligence both at the stage of authorization of hazardous activities[82] and in monitoring the activities in progress after authorization and extending into the phase when damage might actually materialize, in spite of best efforts to prevent the same. The International Court of Justice, in the *Case concerning the Gabčíkovo-Nagymaros Project*, noted the need, and one might say the obligation, for continuous monitoring of hazardous activities as a result of "awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis".[83]

32. These obligations in customary law carry with them some ancillary duties as well. An extension of this obligation for the purpose of present draft principles is the duty of the State concerned to be ever vigilant and be ready to prevent the damage as far as possible and when damage indeed takes place to mitigate the effects of damage with the best available technology.[84] States are therefore obliged to develop, by way of response measures, necessary contingency preparedness and employ the best means at their disposal once the emergency arises, consistent with the contemporary knowledge of risks and technical, technological and financial means available to manage them. The State is also under an obligation in customary law to notify all concerned States in case of any emergency arising from the operation of the activity in question when the spread of transboundary damage is imminent or is a fact.[85] Once notified, there is an obligation under customary law upon the States affected also to take all appropriate and reasonable measures to mitigate the damage to which they are exposed.[86] It is clear that the duty of care

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[82] Closely associated with the duty of prior authorization is the duty to conduct an environmental impact assessment (EIA). See Xue Hanqin, *supra* note 39, at p. 166. Phoebe Okowa notes at least five types of ancillary duties associated with the obligation to conduct EIA. One of them is that the nature of the activity as well as its likely consequences must be clearly articulated and communicated to the States likely to be affected. However, she noted that with the exception of a few conventions, it is widely provided that the State proposing the activity is the sole determinant of the likelihood or seriousness of adverse impact. None of the treaties under consideration permit third States to propose additional or different assessments if they are dissatisfied with those put forward by the State of origin. See Phoebe N. Okowa, "Procedural Obligations in International Environmental Agreements", BYBIL, vol. 68 (1996), pp. 275-336, pp. 282-285, p. 285. On the content of EIA, ibid., fn. 25, p. 282, p. 286.

[83] Judgment, *I.C.J. Reports*, 1997, p. 7, para. 112.

[84] Ibid, at para. 140. The Court stated that it is mindful that in the field of environmental protection vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. On the requirement of best available technology, see *supra* note 71.

[85] Phoebe Okowa, *State Responsibility ..., supra* note 26, p. 170, who thoroughly analysed the various components of the due diligence obligations, including their legal status, is very positive about the duty of the State of origin to notify all concerned States in case of an emergency situation of the dangers to which they have been exposed.

[86] In the *Gabčíkovo-Nagymaros Project case*, in defence of the variant C it implemented on the river Danube appropriating nearly 80 to 90 per cent of the water of the river Danube, in the face of Hungary's refusal to abide by the terms of the treaty concluded between Czechoslovakia and Hungary in 1977, Slovakia argued that "It is a general principle of international law that a party

expected of a State in this regard is the duty associated with good governance. Nevertheless, it must be borne in mind, given the wide divergence of social and economic conditions obtaining among States, as principle 11 of the Rio Declaration notes so aptly, that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.[87]

D. Principle of non-discrimination and minimum standards

33. The principle of non-discrimination is referred to in paragraph 3 of draft principle 6 and provides that States should ensure no less prompt, adequate and effective remedies to transboundary victims than those available to its nationals. That principle could thus be seen to be referring to both procedural and substantive requirements. The first requirement, which is essentially a procedural one, means that the State of origin should grant access to justice to the residents of the affected State on the same basis as it does for its own nationals. This is a requirement which is gaining increasing acceptance in State practice.[88] The second, the substantive aspect of the requirement of non-discrimination, on the other hand, raises more difficult issues concerning its precise content and lacks similar consensus.[89] It is suggested that as long as the same

injured by the non-performance of another contract party must seek to mitigate the damage he has sustained". The Court referring to this principle noted that "it would follow from such a principle that an injured State which has failed to take necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided." The Court observed that "(W)hile this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act." It is a different matter that the Court found the implementation of variant C as a wrongful act and hence did not go further to examine the principle of the duty of the affected States to mitigate the effects of damage to which they are exposed. See Judgment, *I.C.J. Reports*, 1997, p. 7, para. 80. The very willingness of the Court to consider any failure in this regard as an important factor in the computation of damages to which those States would eventually be entitled amounts to an important recognition under general international law of the duty imposed on States affected by transboundary harm to mitigate the damage to the best extent they can.

[87] For a note on some of the general rules of international law applicable to the discharge of the duties of due diligence, see Peter-Tobias Stoll, *supra* note 71, pp. 180-183, and for the need to apply the standard of due diligence with due regard for the economic and social factors affecting States, pp. 181-182. For a suggestion that if the State community "wishes to enhance the technology used, there is the possibility of doing so by transferring the appropriate conservation or preventive technology to the States which have no access thereto for economic or other reasons", see Wolfrum, *supra* note 71, pp. 15-16.

[88] See Alexandre Kiss and Dinah Shelton, *International Environmental ...*, *supra* note 66, pp. 201-203, and Birnie and Boyle, *International Law ...*, *supra* note 48, pp. 269-270. According to the procedural aspect of non-discrimination, some requirements of the procedural laws of the State of origin should be removed, among them are, as Cuperus and Boyle note, "the security of costs from foreign plaintiffs, the denial of legal aid and the denial of jurisdiction over actions involving foreign land" (K.W. Cuperus and A. E. Boyle, Articles on Private Law Remedies for Transboundary Damage in International Watercourses, International Law Association, Report of the 67th Conference, Helsinki (1986) at pp. 406-407).

[89] Birnie and Boyle note that insofar as it is possible to review State practice on such a disparate topic as equal access, it is not easy to point to any clear picture (ibid. pp. 271-274). On the limitations of the non-discrimination rule, ibid. pp. 274-275. Also see Xue Hanqin, *Transboundary ..., supra* note 39, pp. 106-107. Also see Alexandre Kiss and Dinah Shelton, *International Environmental ..., supra* note 66, pp. 201-203. Birnie and Boyle, *International Law*, *supra* note 48, pp. 269-270. P. M. Dupuy, "*La contribution du principe de non*

substantive level of remedies is provided to transboundary victims as those made available to the nationals, the requirements of the principle should be treated as fully complied with.

34. Viewed thus, as paragraph (7) of the Commentary to draft principle 6 notes, for all its disadvantages, "in providing access to information, and in ensuring appropriate cooperation between relevant courts and national authorities across national boundaries, the principle does go beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants".[90] As the same Commentary notes, the disadvantage remains that paragraph 3 of principle 6 does not, and given the economy of the draft, cannot "alleviate or resolve problems concerning choice of law", which are a significant factor and at the moment an "obstacle" to the delivery of prompt, adequate and effective judicial recourse and remedies to victims. States, with the assistance of appropriate professional bodies, must continue to strive both bilaterally and multilaterally to alleviate these problems.

35. In some regions, the content of minimum standards is continually being improved. However, to achieve such minimum standards at the global level there has to be a greater economic, social and political integration of values among different States and across regions in the world.[91] Thus, while an absolute equality cannot be ensured in all jurisdictions by way of global common minimum standards, it should still be possible to suggest that the principle of non-discrimination does assume that suitable remedies and adequate compensation would be available to nationals in the first instance in case of any damage arising from hazardous activities and that the same remedies and levels of compensation would be available to the transboundary victims as well.

E. Ensuring prompt and adequate compensation

36. Draft principle 3 refers to prompt and adequate compensation as the main objective of the draft principles. The standard of promptness and adequacy, which is observed to be the most significant contribution of the scheme adopted by the Commission in 2004, is a standard that has support in the *Trail Smelter Arbitration*, principle 10 of the Rio Declaration and article 235 (2) of the 1982 United Nations Convention on the Law of the Sea, in article 2(1) of the 1996 Helsinki articles on international watercourses, prepared by the International Law Association, and in human rights law precedents.[92]

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discrimination à l'élaboration du droit international de l'environnement", *Revue Québécoise de Droit International*, Vol. 7 (1991-1992) p. 135. For the view that the principle of non-discrimination has become a principle of general international law, see Henri Smets, *"Le principe de non-discrimination en matière de protection de l'environnement"*, *Revue Européenne de Droit de l'Environnement*, 1/2000, at p. 3. On the limitations of the non-discrimination rule, see Birnie and Boyle, ibid., pp. 274-275.

[90] *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10* (A/59/10), principle 6, commentary, para. (7).

[91] Xue Hanqin in *Transboundary ...*, *supra* note 39, pp. 107, 108, makes the point well when she notes first that "damage recovery is not merely concerning judicial justice, but an economic issue requiring resource allocation", and second, that even "when within an ecological system, where each and every portion of the resources is physically interrelated, national boundaries cannot simply be overlooked, since different political, economic and social systems exist within them."

[92] For helpful guidance on the strength of the principle of prompt and adequate compensation see Boyle, *Globalizing ...*, *supra* note 64, p. 18.

37. In this connection, it should be clarified that "promptness" refers to the procedures that would govern access to justice and rendering necessary decisions in accordance with the law of the land determining the compensation payable in a given case. This is also a necessary criterion to be emphasized in view of the fact that litigation in domestic courts involving claims of compensation could be costly and protracted over several years. To render access to justice more widespread, efficient and prompt, suggestions have been made to establish special national or international environmental courts.[93] On the other hand, "adequate" compensation could refer to any number of things.[94] For example, the lump sum amount of compensation agreed upon as a result of negotiations between the operator or the State of origin and the victims or other concerned States following the consolidation of claims of all the victims of harm is an adequate compensation. Compensation awarded by a Court as a result of the litigation entertained in its jurisdiction is adequate as long as the requirement of due process of law is met. In any case, as long as compensation awarded is not arbitrary or grossly disproportionate to the damage actually suffered, even if it is less than full can be regarded as adequate. In other words, adequacy is not intended to denote "sufficiency".

IV. Final form of draft principles

38. It must first be observed that although the projects on prevention and on allocation of loss in case of damage (including liability) were conceived originally as integral, they have actually proceeded substantively at two different levels. The draft articles on prevention were developed with a wide consensus on the content, which received ever growing acceptance in State practice and even more importantly, recognition in judicial decisions around the world. On the other hand, the draft principles on allocation of loss are built upon some general principles on which wide consensus exists. For example, the basic objective of the draft principles, the obligation to provide prompt and adequate compensation to victims of transboundary damage, is well accepted in State practice and national judicial decisions, and some commentators treat it as a general principle of international law. Accordingly, at least one commentator suggested that the Commission should consider changing the language in draft principles 4(1), 6(1) and (3) from a mere recommendatory form to a more prescriptive one by replacing the word "should" with the word "shall" if the progress of the Commission on this important subject is not reduced to a mere "illusion".[95]

39. However, as concerns the complex of associated obligations which are equally important to give full effect to the basic obligation, it appears time is needed for them to gain judicial recognition and affirmation in State practice. The obligations

[93] A. Rest, "Need for an International Court for Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation", *Environmental Policy and Law*, Vol. 24 (1994), pp. 173-187. At the national level, the Indian Law Commission made a very persuasive case for the establishment of national environmental courts in India (see Law Commission of India, One Hundred and Eighty-Sixth Report on Proposal to Constitute Environment Courts, September 2003). Access to justice, particularly in environmental matters is an essential facet of article 21 of the Indian Constitution. New Zealand and Australia already have environmental courts. Available at http://lawcommissionofindia.nic.in/reports.

[94] For an exhaustive enumeration of the implementation of the principle of prompt, adequate and effective compensation in practice, see Rene Lefeber, *Transboundary Environmental ..., supra* note 26, ch. 7, pp. 229-312.

[95] Boyle, Globalizing ..., *supra* note 64, p. 19.

of conduct and the due diligence obligations which the draft principles suggest that the State should bear to give full effect to the principle of prompt and adequate compensation to the victims of transboundary damage arising out of hazardous activities, in contrast to the obligations of due diligence imposed upon the State in the context of prevention, require greater and more uniform acceptance in the practice of States. They also await confirmation by judicial decisions around the world as these are still few and far between. We may refer in this regard by way of illustration to the following principles: the obligation of a State to arrange for a wider net of funds, including the obligation to participate in such a fund to meet the claims of compensation when they cannot be met by the operator either because of the limited liability accepted in the law of the land or of insolvency; the obligation of a State to ensure, and the obligation of the operator to obtain, adequate levels of insurance cover for the risk-bearing hazardous operation;[96] the duty of a State to install a level of contingency preparedness and to possess a technical and economic capacity proportional to the risk of the operation; and the further duties of a State not only to monitor technologically complex operations but also to institute effective response measures in case of an incident; and the duty to move beyond the basic principle of non-discrimination and provide for administrative and judicial remedies and compensation consistent with certain minimum standards on which there is yet no sufficient clarity or consensus.

40. It is not difficult to see why the international consensus is slow in coming. There are differences in legal systems and among the practices of States even when they have similar legal systems. The difficulties inherent in any exercise of harmonization at the global level are also obvious. Political realities, priorities of development and the resource constraints of developing countries are other factors. These points are borne out by a survey of the legal status of the principles noted above and in the previous reports and as part of conclusions reached by the Special Rapporteur in his second report on the allocation of loss.[97]

41. It may also be recalled that the Commission discussed in the past the matter of the form in which the end-product of the present subject matter could be adopted. While one suggestion was to adopt it in the form of a "framework arrangement" without drafting primary rules, another suggestion was to adopt it as guidelines to assist States in giving more positive content to the basic duty of cooperation. "In the event", notes Sinclair, "no final decision was taken on the form of eventual end-product, although it emerges from the debate that the topic might not yield to the treatment the Commission usually applies to the drafting of articles for eventual incorporation in a convention".[98]

42. There is value in couching the entire end-product in a more prescriptive form, only if it is possible and feasible.[99] Equally, it cannot be denied that there is value in casting

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[96] In the context of the European Union negotiations on the liability for environment, it is said that agreement on the directive was reached after nearly 15 years, and one of the last issues holding the agreement was the issue concerning insurance. The compromise was to make the requirement of insurance optional and not mandatory (see European Union Agrees to Make Polluters Pay for Environmental Damages, Agence France Presse, cited in the Swedish national law memorandum prepared by students of the George Washington University Law School, *supra* note 74, p. 17, on file with the Special Rapporteur).

[97] See conclusion (10), A/CN.4/540, para. 36.

[98] Sinclair, *The International Law Commission* ..., *supra* note 61, p. 38.

[99] It is stated that "(C)oncrete obligations (actions and specific measures) tend to be more stringent and rigorous, and monitoring of compliance with concrete obligations is *ceteris paribus*

the end-product in the form of draft principles when that is the best course available for lack of a better alternative.[100] The commentary to the draft principles noted this when it stated that:

> On balance, the Commission concluded that the draft principles would have the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems. It is also of the view that the goal of widespread acceptance of the substantive provisions is more likely to be met if they are cast as recommended draft principles.[101]

43. Such widespread consensus and the inherent merits of the principles themselves would have utility for judges and statesmen to give them effect in domestic and international arena. This might pave the way for eventual codification of international law on the subject by international agreement.

44. Given this reality, it seems appropriate, in the view of the Special Rapporteur, to confirm that the end-product of the topic on allocation of loss be cast in the form of draft principles. However, the Commission may give some serious consideration to reflecting the basic obligation on the duty to pay compensation and the right to seek remedies in language that is more prescriptive.

V. Relationship between draft principles and the draft articles on prevention

45. The question then arises as to the relationship between the draft articles on prevention which are awaiting further action in the General Assembly and the draft principles on allocation of loss. It is suggested that it may be feasible for the General Assembly to adopt the draft articles on prevention. Indeed, in 2001 the Commission recommended to the General Assembly the elaboration by the

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considerably easier than doing it with other categories of obligations. In addition, concrete obligations have a potential for preventing disputes, especially if obligations at the same time implicitly or automatically constituting direct rights for parties, such as obligations relating to transboundary activities (e.g., the 1998 Rotterdam Convention on the Prior Informed Consent Procedures for Hazardous Chemicals and Pesticides in International Trade and the CPB)"; see Veit Koester, "Global Environmental Agreements-Drafting, Formulation and Character", *Environmental Policy and Law*, Vol. 35/4-5 (2005), pp. 170-183, p. 173). However most multilateral environmental agreements are a good example of "the art of the possible", because they are adopted by consensus. The process has been described as a strong tendency to seek the "lowest common denominator", and in even more pessimistic ways. But the fact is that "countries desire to become parties and therefore promote provisions with which they will be able to comply, assessing to that end not only to what extent, for example, amendments of national legislations are needed, but also to what extent they are feasible, their economic consequences, etc. Considerations like this can hardly be criticized" (ibid., p. 170).

[100] Ibid., p. 174. It has been observed that "soft law instruments provide for many advantages such as the willingness to adopt clear (ambiguous) commitments, which are more effective because they are more easily translated into specific actions and more readily reviewed and evaluated. Research has also demonstrated that the influence of soft law instruments on behaviour can be very positive, and that the 'benefits of non-binding instruments due to several reasons often [are] most evident when applied in tandem with legally binding measures'. So 'soft' law instruments can be a means to further effectiveness. Furthermore, such instruments can improve compliance and serve as tools for preventing disputes to the extent they provide clarity about the detailed and precise content of commitments under the treaty."

[101] General Commentary, para. (14), Commentary, *supra* note 15, p. 160.

Assembly of a convention on the basis of the draft articles on prevention of transboundary harm from hazardous activities. As appropriate, this may be done in a review within a working group of the Sixth Committee. Such a review may consider including some elements of liability in the draft articles on prevention in the form of a draft article on liability to endorse the obligation of States to ensure effective judicial access and remedies and prompt and adequate compensation to victims of transboundary damage. The same draft article could note that this basic obligation should be achieved keeping in view the draft principles on allocation of loss which the Commission may wish to finalize in the second and final reading. These draft principles could be annexed in a separate part of any accompanying resolution.

46. The other possibility is to treat the prevention and liability aspects, although interrelated, entirely separately. Two separate resolutions may be adopted by the General Assembly endorsing and adopting the draft articles on prevention on the one hand and draft principles on allocation of loss on the other. The Commission could suggest these possibilities to the Assembly. Eventually, this is essentially a matter for the Assembly to decide after due consideration of the matter.